FILE COPY

FILED
SEP 9 193
CHARLES ELMORE CR

No. 330.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY, PETITIONERS,

VS.

HARDING GLASS COMPANY, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

JOSEPH R. BROWN,
JAMES B. McDONOUGH,
Counsel for Respondent.

INDEX

Contract in Question, The 2

Suggestions as to Obligations and Substance of Contract 4

Additional Facts 8

Argument 16

Point One. The Decision of the Court Below is not in Conflict With the Decisions of Other Circuit Courts of Appeal on the Same Matter 16

Decision in Tenth Circuit is not in Conflict ... 17

Decision in Fifth Circuit is not in Conflict 20

Decisions in Other Circuit Courts of Appeal are in Line With the Decision of the Eighth Circuit on the Question Involved 24

Consideration of the Contract 25

Partial Restraint of Trade Will not be Tolerated in a Contract Between a Public Service Corporation and Its Customers 28

Point Two. The Decision of the Court of Appeals is not Untenable; Neither is it in Conflict With the Weight of Authority 33

Point Three. The Decision of the Court of Appeals is not in Conflict With the Applicable Local Decisions on an Important Question of Local Law. On the Other Hand, the Constitution and Decisions of Arkansas are in Line With the Opinion of the Court of Appeals .. 41

Arkansas Constitution, Laws and Decisions Showing that the Contract in Controversy is Void as Against Public Policy 41

Conclusion. 50

TABLE OF CASES.

Addyston Pipe & Steel Co. vs. U. S., 85 Fed. 271 28
Aetna Life Insurance Co. vs. Whitfield, 205 U. S. 489 17
Amarillo Oil Co. vs. Ranch Creek Gas Co., 271 S. W. 145 31
American Laundry Co. vs. E. & W. Dry Cleaning Co., 74 So. 58 23
Anderson vs. Jett, 89 Ky. 375 32
Anderson vs. Shawnee Compress Co., 17 Okla. 231 32
Arnold vs. Jones Cotton Co., 152 Ala. 501 23
Averill vs. Central New York T. & T. Co., 199 N. Y. 128 28

Bailey & Graham vs. Phillips, 159 Fed. 535 24
Barrows vs. McMurtry Mfg. Co., 54 Colo. 432 .. 32
Berry vs. Woodruff, 40 Ark. 252 44
Boutwell vs. Marr, 71 Vt. 1 32
Burk vs. Coombs, 40 Cal. App. 8. 39
B. V. D. Co. vs. Isaac, 257 Fed. 709 24

Cap F. Bourland Ice Co. vs. Franklin Utilities Co., 180 Ark. 770 42
Central New York T. & T. Co. vs. Averill, 199 N. Y. 128 28
Chapin vs. Brown Bros., 83 Iowa 156 32
Chicago, etc., Railroad Co. vs. Pullman Southern Car. Co., 139 U. S. 79 34
Chicago, I. & L. Ry. Co. vs. Southern Ind. Ry. Co., 70 N. E. 843 39
Chicago Gas Light Co. vs. People's Gas Light Co., 121 Ill. 530 28
Clear Creek Oil & Gas Co. vs. Ft. Smith Spelter Co., 148 Ark. 260 9
Clear Creek Oil & Gas Co. vs. Ft. Smith Spelter Co., 267 U. S. 231 9
C. M. & St. Paul Ry. Co. vs. Wabash, 61 Fed. 993 24

Cold Blast Transportation Co. vs. K. C. Bolt & Nut Co., 114 Fed. 77 35
Consolidated Gas Co. vs. Gibbs, 130 U. S. 396 ..19, 29
Continental Candy Corp. vs. California & Hawaiin Sugar Refining Co., 270 Fed. 302 24
Continental Wall Paper Co. vs. Louis Voight & Sons Co., 212 U. S. 227 1
Coombs vs. Burk, 40 Cal. App. 8 39

Davis vs. Jointless Fire Brick Co., 300 Fed. 1 .. 24
Davis vs. Southern Pacific Co., 235 Fed. 731 24

Edwards vs. Randle, 63 Ark. 318 45
E. & W. Dry Cleaning Co. vs. American Laundry Co., 74 So. 58 23

Ficklin vs. Jeffrey, 3 Ark. 227 40
Ft. Smith Light & Traction Co. vs. Kelley, 94 Ark. 461 .....1, 46
Ft. Smith Spelter Co. vs. Clear Creek Oil & Gas Co., 148 Ark. 260 9
Ft. Smith Spelter Co. vs. Clear Creek Oil & Gas Co., 267 U. S. 231 9
Foster vs. Horn, 19 Ark. 346 44
Fox Solid Pressed Steel Co. vs. Schoen Mfg. Co., 84 Fed. 544 24
Franklin Utilities Co. vs. Cap F. Bourland Ice Co., 180 Ark. 770. 42

Georgia Fruit Exchange vs. Turnipseed, 9 Ala. App. 123 23
Gibbs vs. Consolidated Gas Co., 130 U. S. 386 .. 19, 29
Gray vs. Hanauer, 25 Ark. 350 44
Griffin vs. Oklahoma Natural Gas Corp., 37 Fed. (2d) 545 17
Gwynn vs. Telephone Co., 48 S. E. 460. 51

Hanauer vs. Gray, 25 Ark. 350 44
Hardage vs. Stroope, 58 Ark. 303 29

Herschberg vs. Keith, 48 Ark. 146 46
Hilburn vs. Horsley, 44 Ark. 458 29
Horn vs. Foster, 19 Ark. 346 44
Horsley vs. Hilburn, 44 Ark. 458 29
Howcott vs. Kilburn, 44 Ark. 213 16
Hubbard Ayer Inc. vs. Federal Transportation Co., 15 Fed. (2d) 274. 24
Hutchinson Gas & Fuel Co. vs. Wichita Natural Gas Co., 267 Fed. 35 ..... 19.

Jeffrey vs. Ficklin, 3 Ark. 227 43
Johnson vs. Northwestern Mutual Life Ins. Co., 254 U. S. 96 17
Jones Cotton Co. vs. Arnold, 152 Ala. 501 23

Keene Syndicate vs. Wichita Gas, etc., Co., 69 Kans. 284 18
Keith vs. Herschberg, 48 Ark. 146 46
Kelley vs. Ft. Smith Light & Traction Co., 94 Ark. 461 .....1, 46
Kellog Toasted Corn Flake Co. vs. Buck, 208 Fed. 383 24
Kelsey vs. Wood, 90 Ark. 272 1
Kilburn vs. Howcott, 44 Ark. 213 16
Kizer vs. Texarkana & Ft. Smith Ry. Co., 66 Ark. 348 45

Lewis vs. Tallman, 124 Ark. 6 45
Lesser vs. Shapard, 127 Ark. 590 43
Lindsey vs. Rottaken, 32 Ark. 619 44
Logan & Byran vs. Postal Telegraph Co., 157 Fed. 570 16
Lone Star Gas Co. vs. Municipal Gas Co., 3 S. W. (2d) 790 .....25, 35
Louis Voight & Sons Co. vs. Continental Wall Paper Co., 212 U. S. 227 1
Love vs. Kozy Theatre Co., 193 Ky. 336 31

Matthews vs. St. L., I. M. & S. Ry. Co., 64 Ark. 398 45

Montgomery Light & Power Co. vs. Montgomery Traction Co., 191 Fed. 657 20
Montgomery Light & Water Power Co. vs. Montgomery Traction Co., 229 Fed. 672 20
Montgomery Light & Water Power Co. vs. Montgomery Traction Co., 219 Fed. 963 21
Montgomery Traction Co. vs. Montgomery Light & Power Co., 191 Fed. 657 20
Montgomery Traction Co. vs. Montgomery Light & Water Power Co., 229 Fed. 672 20
Montgomery Traction Co. vs. Montgomery Light & Water Power Co., 219 Fed. 963 21
Motion Picture Patent Co. vs. Sampliner, 255 Fed. 424 24
Municipal Gas Co. vs. Lone Star Gas Co., 3 S. W. (2d) 790 .....25, 35

Neary vs. Weil, 278 U. S. 160 33
Northern Iowa Gas & Electric Co. vs. Town of Luverne, 257 Fed. 818 35
Northwestern Mutual Life Insurance Co. vs. Johnson, 254 U. S. 96 17

Oceanic Steam Nav. Co. vs. Corcoran, 9 Fed. (2d) 724 24
Ohio & Mississippi Ry. Co. vs. Wiggins Ferry Co., 72 Ill. 360 5
Oklahoma Natural Gas Corp. vs. Griffin, 37 Fed. (2d) 545 17

Patterson vs. Rogers, 148 Ark. 222 46
People's Gas Light Co. vs. Chicago Gas Light Co., 121 Ill. 530. 28
Pond on Public Utilities, Sec. 205, 207 27
Postal Telegraph Co. vs. Logan & Byran, 157 Fed. 570 16
Pullman Southern Car Co. vs. Chicago, etc., Railroad Co., 139 U. S. 79 34

Randle vs. Edwards, 63 Ark. 318 45
Reeves vs. Decorah Farmers' Cooperative Society, 160 Iowa 194 32
Rogers vs. Patterson, 148 Ark. 222 46
Rottaken vs. Lindsey, 32 Ark. 619 44

Salt Co. vs. Guthrie, 35 Ohio St. 672 31
Sampliner vs. Motion Picture Patent Co., 255 Fed. 242 32
Santa Clara Valley Mill & Lumber Co. vs. Hayes, 76 Calif. 387 40
Shapard vs. Lesser, 127 Ark. 590 43
Shasta County vs. Moody, 265 Pac. 1032 40
Starkey vs. Western Wooden-ware Ass'n, 84 Mich. 76 19
St. L., I. M. & S. Ry. Co. vs. Matthews, 64 Ark. 398 45

Tallman vs. Lewis, 124 Ark. 6 45
Texarkana & Ft. Smith Ry. Co. vs. Kizer, 66 Ark. 348 45
Thomas vs. Railroad Co., 101 U. S. 71 21
Turnipseed vs. Georgia Fruit Exchange, 9 Ala. App. 123 23
Tuscaloosa Ice Mfg. Co. vs. Williams, 127 Ala. 110 23

United States vs. Addyston Pipe & Steel Co., 85 Fed. 271. 28

Waltham Watch Co. vs. Keene, 209 Fed. 1007 . . 24
Webster vs. Williams, 62 Ark. 101 46
Western Union T. Co. vs. Postal T. Co., 217 Fed. 533 24
Weil vs. Neary, 278 U. S. 160 33
Western Wooden-ware Ass'n vs. Starkey, 83 Mich. 76 19
Wells vs. Alexandre, 130 N. Y. 642 35

Whitfield vs. Aetna Life Ins. Co., 205 U. S. 489 .. 17
Wichita Natural Gas Co. vs. Hutchinson Gas & Fuel Co., 267 Fed. 35 19
Wichita, etc. Co. vs. Keene Syndicate, 69 Kans. 284 18
Wiggins Ferry Co. vs. Ohio & Mississippi Ry. Co., 72 Ill. 360 5
Williams vs. Webster, 62 Ark. 101 46
Williams vs. Tuscaloosa Ice Mfg. Co., 127 Ala. 110 23
Whitridge vs. Mt. Vernon Woodberry Cotton Duck Co., 210 Fed. 302 24
Woerheide vs. Barber Asphalt Paving Co., 251 Fed. 196 35
Wood vs. Kelsey, 90 Ark. 272 1
Woodruff vs. Berry, 40 Ark. 252 44
W. Va. Transport Co. vs. Ohio River Pipe Line Co., 22 W. Va. 600 31

No. 330.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY, PETITIONERS,

VS.

HARDING GLASS COMPANY, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

(This brief would have been much shorter had petitioners not omitted many important facts.)

Courts, in determining whether a given contract is contrary to public policy and void, do not restrict themselves to a partial statement of the facts.

Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U. S. 227.

Fort Smith Light & Traction Co. v. *Kelley*, 94 Ark. 461.

Wood v. *Kelsey*, 90 Ark. 272.

In the opinion of the Court of Appeals of the Eighth Circuit (R. 253) facts and circumstances, al-

though not at all completely given there, are amply sufficient to show that the clause of the contract on which this suit is based tends to establish a monopoly, and is therefore void as against the public policy of the State of Arkansas.

As petitioners have not printed the contract either in their petition or brief, for the convenience of the court we here set it out in full.

The Contract in Question.

The said contract (R. 12 and 139) is in full as follows:

TWIN CITY PIPE LINE COMPANY, FORT SMITH, ARKANSAS.

In consideration of the undertakings and agreements hereinafter set out to be done and performed by the Twin City Pipe Line Company and Industrial Oil & Gas Company and the Harding Glass Company, it is mutually agreed as follows:

(1) All judgments and decrees now entered for or against either of them, or S. H. Hale, are to be satisfied and cancelled, and all former contracts between S. H. Hale and the Harding Glass Company, and between the Industrial Oil & Gas Company and the Harding Glass Company, and between the Twin City Pipe Line Company and the Harding Glass Company, are hereby abrogated as of September 1, 1926.

(2) All suits and appeals now pending between either of the parties hereto, or S. H. Hale, are to be dismissed and each party thereto is to pay its own

costs, all questions involved in said suits having been adjusted and settled.

(3) The Twin City Pipe Line Company agrees to lay at once an 8 inch pipe line from a connection with its ten inch line at or near what is known as "The Carbarn" to a connection with its 8 inch line on Sixth Street near its regulator station, said 8 inch line to run by the meter station where the gas furnished the Harding Glass Company is measured, and to be connected at said meter station with the lines furnishing the Harding Glass Company with gas.

(4) The Harding Glass Company agrees to take all its requirements of gas for its plants in the City of Ft. Smith, Arkansas, from the Twin City Pipe Line Company so long as the Twin City Pipe Line Company can adequately supply its requirements and to pay for all gas furnished it hereunder, beginning September 1, 1926, at the regular sliding schedule of rates of twelve cents to fifteen cents, which is the rate now in effect for industries in the City of Fort Smith, Arkansas, or at such rate as may hereafter be fixed for industries in the City of Fort Smith by the proper regulatory body or court having jurisdiction. All gas consumed by the Harding Glass Company up to September 1, 1926, shall be paid for at the rate of ten cents per thousand cubic feet.

(5) The Harding Glass Company agrees that in the event there is a shortage of gas so that there is not enough to adequately supply the domestic consumer, that the Twin City Pipe Line Company may discontinue

serving it gas, upon condition that the same character of service be given the Harding Glass Company that is given other industries in the City of Fort Smith, Arkansas, and that his gas service be not discontinued unless that of other like industries is discontinued also.

Witness our hands this 30th day of August, 1926.

Harding Glass Company,
By C. H. Harding,
President.

Industrial Oil & Gas Co.,
By W. R. Martin,
President.

Twin City Pipe Line Co.,
By W. R. Martin,
President.

I consent to the above.
S. H. Hale.

Suggestions as to the Obligations and Substance of Said Contract.

In our opinion, these suggestions are important as tending to show the soundness of the opinion of the Court of Appeals of the Eighth Circuit, but for the sake of brevity we will discuss only those relevant to the three points discussed in the petition and brief of the petitioners.

(1) Said contract was on the letterhead (R. 12) of the Twin City Pipe Line Company, and was prepared by the president of that company (R. 174) and tendered to the respondent for signature.

(2) In the prefatory clause of said contract it is recited that the consideration is "the undertakings and agreements hereinafter set out." If that contention

is sound as we believe, the contract lacks mutuality, and for that reason is unenforceable, there being no obligation upon the petitioners to furnish any gas. If the petitioners had desired an enforceable contract, it does seem that they would have used language plainly obligating them to furnish the gas, especially so since in some jurisdictions it is held (*Wiggins Ferry Co.* v. *Ohio and Mississippi Ry. Co.*, 72 Ill. 360) that, where a contract is in restraint of competition in trade, obligations will not be supplied by implication.

(3) The judgments and decrees referred to were those in suit 448. In that suit there was a judgment in favor of the Twin City Pipe Line Company against the Harding Glass Company for $17,155.46, but that judgment was destroyed by a judgment over in favor of the Harding Glass Company against S. H. Hale and the Industrial Oil & Gas Company, one of the petitioners, for the same sum (R. 108-109). As petitioners had warranted to Hale to save him harmless (R. 128) from the claim of the Harding Glass Company against said Hale on Hale's contract to furnish gas to the respondent (R. 231), said decree therefore, instead of being upon the whole a judgment against the Harding Glass Company, was in truth and in fact a judgment in favor of the Harding Glass Company sustaining its right to ten cent gas until October 30, 1928. Taking the quantity of gas used by the Harding Company (R. 157) as given in the evidence of the petitioners, that judgment in favor of the Harding Company sustaining the Hale contract and the liability of one of the petitioners thereon, was worth to the Harding Glass Com-

pany, being the difference between the city rate of gas and the ten cent rate, the sum of $45,909.81. That sum is easily calculated by taking the quantity of said gas (R. 157) and applying it to the two rates and taking the difference. The satisfaction of the decrees was therefore a detriment to the Harding Company in the sum named.

(4) Appeals had been taken by several of the parties to the Court of Appeals of the Eighth Circuit, taking the whole controversy to that court. The contract provided for the dismissal of all those appeals. Therefore, the considerations for that provision balanced each other.

(5) Upon the undisputed evidence the construction of the eight inch service line imposed upon the Twin City by the third paragraph of the contract, and the only expressed obligation upon the Twin City, cannot in law or equity be a consideration to support the illegal restrictive clause in paragraph (4) binding the Harding Company to take all its requirements without limit of time. In truth the petitioner Twin City Pipe Line Company made a profit by the construction of that service line. Its profit is the difference between the cost of that service pipe line and the saving which it made by getting rid of the decree establishing the ten cent rate. Assuming that said service pipe cost the Twin City $4,489.92 (R. 141), as the Twin City made a profit by abrogating the ten cent gas rate of $45,909.81, its net profit is the difference between the two, which amounts to a clear net profit to the Twin City of $41,419.99.

(6) In paragraph (4) of the contract, the Harding Glass Company agrees to take all its requirements of gas from the Twin City "so long as the Twin City Pipe Line Company can adequately supply its requirements." If the Twin City had wanted to bind itself and its subsidiary, Industrial Oil & Gas Company, to furnish the gas, it would have said so in plain words. In turn it would have acted as did the LaSalle Oil & Gas Company and the Fort Smith Light & Traction Company when Hale entered into a ten year contract with said Light & Traction Company, and would have had the subsidiaries of the petitioners enter into obligations binding them to furnish to the petitioners sufficient gas to fulfill the contract. That situation was known to the petitioners at the time of the making of the contract in question. See answer of Twin City (R. 91) and answer of Fort Smith Light & Traction Company (R. 97). The failure to make such underlying contracts tends to show that the Twin City did not regard said contract as binding it to furnish any gas whatever.

(7) There is absolutely no expressed obligation of the Twin City Pipe Line Company to furnish any gas whatever.

(8) There is no word or sentence in the contract, by implication or otherwise, obligating the Industrial Oil & Gas Company, one of the petitioners, to furnish gas to the respondent or to furnish any gas to the Twin City. Hence the Industrial does not obligate itself to drill wells or to produce or furnish gas. The Twin

City drills no wells (R. 96) and, so far as this record shows, has no power so to do.

(9) The only time limit in said contract is apparently the life of the gas field. Gas was discovered in that community and used in the city of Fort Smith (94 Ark. 461) nearly thirty years before this contract was made. Since larger and better fields of gas have been repeatedly discovered since 1903, this contract therefore, if valid, may last at least a third of a century and probably a century.

(10) Petitioners claim that it was unlawful for the Twin City Pipe Line Company, a public service corporation, to sell gas at any rate other than the city rate; yet this contract expressly agrees that all gas consumed by the respondent up to September 1, 1926, the day after the contract, "shall be paid for at the rate of ten cents per thousand cubic feet." That clause judged by the petitioners' contention in suit 448, as shown in the petitioners' pleadings (R. 76, 77, 78), is absolutely void.

Some Additional Facts.

The Harding Company (R. 210) located its business and plant at Fort Smith largely (R. 217) because of the discovery of a great gas field. The discovery of said gas in so large quantities was in 1916 (R. 155, 168). At that time the petitioner, Twin City, had as its subsidiary the Wildcat Oil & Gas Company. That company, which was a producing company only (R. 168), went out of business in 1919. A court will

judicially know that the discovery of such a large gas field always attracts manufacturers. This one was no exception to the rule and said manufacturers were offered gas at four cents.

Clear Creek Oil & Gas Co. v. *Fort Smith Spelter Co.*, 148 Ark. 260.
Fort Smith Spelter Co. v. *Clear Creek Oil and Gas Co.*, 267 U. S. 231.

The evidence shows (see evidence of A. G. Williams, Jr., General Manager of petitioners, pp. 139, 154, 156, 165, 166, 167, 168, 169, 171, 172) that there were three separate interests participating in the development of the great gas fields of Crawford County. One interest included the Crowe Oil & Gas Company, which was a producing company only, with its subsidiary, the LaSalle Oil and Gas Company, which was a transporting and distributing company; the Clear Creek Oil and Gas Company, which produced, transported and sold; and the petitioners. These three separate interests were active competitors. The LaSalle Oil and Gas Company constructed a pipe line from the gas fields of Crawford County to Van Buren and there connected with the pipe lines of the Fort Smith Light & Traction Company. The latter company, through its subsidiary, owned a small gas field southeast of Fort Smith known as the Massard field. Hence there were at that time four separate interests producing and transporting gas to Fort Smith and its environs. All were actively competing for business in that community. The respondent was probably the largest industrial consumer of gas there, using when

operating from a million to a million and a half cubic feet of gas per day. It had been the customer of the Twin City, without contract of any kind, from the establishment of its plant in 1917 down to the time that it made its contract with S. H. Hale, which was a five year contract.

Prior to 1923 S. H. Hale was not interested in that gas field. Sometime prior to July, 1923, and the date is not given, S. H. Hale acquired all the gas rights, gas fields, transportation lines and property of the Crowe Oil & Gas Company, the LaSalle Oil & Gas Company, and the Clear Creek Oil and Gas Company, thereby coming into the possession of a large supply of gas. About that time or soon after, the field known as the Alma field was developed, which was a great producing field of gas. Hale began an active competition for the furnishing of gas to the consumers of Fort Smith and its environs. In July, 1923, he entered into a ten year contract with the Fort Smith Light and Traction Company (R. 91, 129) to supply it with gas at ten cents and under certain conditions 12.5 cents (R. 131). There is no showing as to whether that gas is still furnished at that figure. That contract was made under the name of LaSalle Oil and Gas Company. That company agreed to sell, and the Fort Smith Light & Traction Company agreed to buy all the requirements of the Fort Smith Light & Traction Company for that period, except a small supply which was then being taken from the Twin City and the Southwestern General Gas Company. Soon after that contract was made, Hale made his contract

with the respondent (R. 31) whereby Hale agreed to sell and the respondent agreed to buy for five years the entire requirements of the respondent at ten cents. By those contracts Hale secured two of the largest consumers, thus successfully competing with the petitioners. The price fixed in the Hale contract with respondent was ten cents, and the same price in the contract with the Fort Smith Light and Traction Company with a provision in the latter contract raising the price to 12½ cents when the quantity exceeded a certain amount (R. 131). Both rates were less than the rate fixed by the city.

Within a week (see district court's opinion, page 127) after that Hale contract was made with respondent the petitioners bought all the gas properties and gas rights (except that known as the Gans field) of S. H. Hale, the LaSalle Oil & Gas Company, the Crowe Oil & Gas Company, and the Clear Creek Oil & Gas Company. That deal made the petitioners the owners and absolute controllers of all gas producing and gas selling and transportation from the Crawford County fields, which were the great fields. That deal left outstanding the gas known as the gas of the LeFlore County Gas & Electric Company, sometimes referred to as the Orr gas (R. 177), and the small Massard field owned by a subsidiary of the Fort Smith Light & Traction Company; and that of the Citizens Gas Company which latter was intended solely for the respondent. In the winter of 1924-25 the respondent, by reason of a shortage of gas furnished to it by the Twin City, suffered a tremendous loss reaching above $50,-

000.00 (R. 217). The respondent contended that loss (R. 87) was due to insufficient service arrangements and that the Twin City discriminated by furnishing sufficient gas pressure to all of their consumers in that neighborhood. See also evidence of Harding (R. 225). Respondent's service pipe was a nine hundred feet, four inch pipe (William's evidence, R. 142). *Respondent offered to pay the expense of installing sufficient service pipes* (R. 87). In the opinion of the district court in refusing the preliminary injunction (R. 124) reference is made to the *four inch* service pipe, and to a previous service pipe (R. 122) which latter had been taken up when respondent notified petitioner that respondent would no longer take gas from petitioner, evidently referring to the time when respondent changed to Hale. In said opinion the district court (R. 125) in substance held that but for the then shortage of gas, relief might have been given to respondent for a better service pipe. But in the final decree the district court dismissed respondent's bill of complaint in suit 448 for want of equity (R. 108).

The evidence shows that to manufacture glass, it is necessary to have a large and continuous supply. The respondent had an investment of nearly a million dollars (R. 218), and, on account of its tremendous loss, it decided it could not remain in Fort Smith unless it should find a supply of gas to prevent a recurrence of said losses. Therefore, in the summer of 1925 persons, who afterwards formed themselves into the Citizens Pipe Line Company (R. 182), and many of whom are in no manner connected with the Harding

Glass Company, began a development which resulted in bringing in a valuable gas field in Oklahoma only a short distance across the river from Fort Smith. That development discovered a field sufficient to furnish the Harding Glass Company with practically all its needed gas. The corporation to develop that field (R. 231) was organized March 26, 1926, before the contract in controversy was signed. The petitioners, in taking over from Hale all his corporations and gas properties, obligated themselves to perform all of Hale's contracts, including his contract with the respondent (R. 128, 129). There is some difference as to the exact date when the petitioners took over the Hale obligations. That difference is immaterial since all admit that said obligations were taken over and were taken over in October, 1923. From that date (R. 127) the Twin City fulfilled the Hale contract and the Hale obligations to furnish gas to the Harding Company *until it acquired the Cazort gas for a longer period* (R. 19, 35, 36, 61, 62, 166).

At the time that petitioners secured all of the available gas in Crawford County, there was what is known as the Cazort gas, but Cazort had no pipe lines (see answer of respondent in suit 448, pages 19, 35, 61). At the time that the deal was made between Hale and the petitioners, the Cazort gas was controlled by a short contract between Cazort, Hale, and the petitioners (R. 166). The petitioners without complaint fulfilled the Hale contract with respondent until they had renewed the contract with Cazort (R. 166). On January 20, 1925 (R. 166) the petitioners secured the

Cazort gas under *an extended contract*, the full extent of it not being given. *Within four days thereafter* (R. 213) the Twin City wrote a very important letter to the Harding Glass Company giving notice (R. 214) that gas would be billed at the city rate. For the first time the Twin City, in that letter, contended that Hale contracted to furnish respondent with gas from one well only. *Hale's contract is not so worded* (R. 31). Said letter (R. 213) claims that it is the intention of the Twin City *"to carry out the contract."* Yet when litigation arose petitioners claimed said contract was void (R. 76, 78, 79). The district court upheld the Hale contract as against petitioner Industrial Oil and Gas Company, and held in effect *that the Harding Glass Company was entitled to gas at ten cents until October 30, 1928* (R. 138, 108). The Harding Company refused to pay the increased rate demanded and the Twin City thereupon brought suit to recover the difference between the two rates. That suit resulted in the decrees referred to in suit 448, being a decree upholding respondent's right to ten cent gas to October 30, 1928, which right was worth to the respondent $45,909.81 as heretofore shown.

Before this suit was tried, the petitioners, evidently fearing competition from S. H. Hale with his Gans gas, secured the Gans gas. Some one had already secured a franchise in Fort Smith under the name of the Border Gas Company (R. 187), and it was alleged in the answer of the Citizens Pipe Line Company (R. 193) that that franchise had been secured or purchased by the same parties who control the petitioners and

that the acquisition of said Border Gas Company was to enable the persons who control the Twin City to obtain a complete monopoly of all gas in and about Fort Smith. Since the Gans gas field was owned by Hale, and in view of what Williams says about persons interested with petitioners securing the Gans gas (R. 170), it is believed that the Border Gas Company was a Hale concern.

The petitioners' evidence shows that that gas was obtained in a contract between S. H. Hale individually and Thompson Ross individually (R. 170, 174). The petitioners did not produce the contract and the court sustained their refusal (R. 171). Also before this suit was tried, the same interests which now control the petitioners secured all the gas properties of the Fort Smith Light & Traction Company and organized the Fort Smith Gas Company for that purpose (R. 177). Therefore, at the trial of this case, all gas fields near Fort Smith were secured and owned by the petitioners and their allied interests, except that owned by the Citizens Gas Company and the Citizens Pipe Line Company and the gas at Poteau, in the State of Oklahoma, some twenty-eight miles from Fort Smith.

ARGUMENT.

The respondent contends that there is no sound ground upon which the petition may be granted.

POINT ONE.

The decision of the court below is not in conflict with the decisions of other circuit courts of appeal on the same matter.

It is respondent's contention that that portion of the contract which obligates the respondent to take all its requirements from the Twin City, which is the clause on which this suit is based, is void as against public policy of the State of Arkansas.

This court will not grant writs of certiorari to change the public policy of a state, nor to harmonize conflicts in the public policy of the different states.

In a well prepared opinion, the late Judge Trieber, district judge of the Eastern District of Arkansas, in the case of *Logan & Byran* v. *Postal Telegraph Company*, 157 Fed. 570, quoting from the syllabus, said:

> "Courts will refuse to enforce a contract, although lawful and enforceable in the courts of the nation where it is entered into and is to be performed, if it is against the public policy of the state in which it is sought to enforce it."

In *Howcott* v. *Kilburn*, 44 Ark. 213, the court held that the validity of a contract must be determined by the law of the place where made. Hence the Court of Appeals, (39 Fed. (2d) 409) in this case, well said:

> "The public policy to be ascertained is the public policy of Arkansas."

This court has repeatedly held that the public policy of a state is a matter within the exclusive power and jurisdiction of the state itself.

Northwestern Mutual Life Insurance Co. v. *Johnson*, 254 U. S. 96.

Whitfield v. *Aetna Life Insurance Co.*, 205 U. S. 489.

The decision in the tenth circuit is not in conflict.

Petitioners rely upon the case of *Griffin, et al.* v. *Oklahoma Natural Gas Corporation*, 37 Fed. (2d) 545. In that case the City of Iola, Kansas, agreed to buy its supply of gas from the J. B. Kirk Gas & Smelting Company, which company was not a public utility. The City made two contracts, both with the same company, which will be called the Kirk Company. In the first contract, the Kirk Company agreed to sell and deliver to the City of Iola, and the City of Iola agreed to buy, all natural gas required by the City for fuel in the operation of the City's electric light and water works plant. The City also agreed to buy gas for fuel for its power plant. In the second contract, the Kirk Company agreed to sell and deliver to the City of Iola, and the City agreed to purchase natural gas for resale to the inhabitants of the City for domestic and other uses. The contract was assigned by the Kirk Company to the Oklahoma Natural Gas Corporation. That company, relying upon the validity of the contract, expended the sum of $310,000.00 in improvements, improving the gas supply and the transportation facilities. After that expenditure by said corporation, the City of Iola

entered into a contract with Griffin, whereby Griffin agreed to furnish gas to the City of Iola for a certain period.

Thereupon the Oklahoma Natural Gas Corporation brought the suit to enjoin the City of Iola and Griffin from a breach of the contract. Among other contentions, the City and Griffin asserted that the contracts were void because in restraint of trade. They did not contend that the contracts were void because against public policy. The case was not that of an exclusive contract between a public utility and a customer. *The City itself was the only customer of the Oklahoma Gas Corporation at Iola.* It was a contract to supply to the City gas to enable the City to furnish to the public, power, heat and light. It was therefore a contract *in the interest of the public* and was in no manner inimical to the public. The City of Iola did not contend that the contract was void because it injured the public.

If the Griffin case has the meaning given it by counsel for the petitioners, then said Griffin case is plainly in conflict with the public policy of the State of Kansas as shown by its decisions and statutes. This is shown by the decision of the Supreme Court of Kansas in the case of *The Keene Syndicate* v. *The Wichita Gas, Electric Light and Power Company,* 69 Kans. 284, a case decided long before the Griffin case. In that Kansas case, a corporation engaged in the business of generating and furnishing electricity for public and private use, leased to a rival corporation in the City for a period of ten years machinery

and appliances used in generating electricity, obligating itself not to engage in the business of furnishing electric light and power to the public during that period. In holding said contract invalid, the Kansas court used this language:

> "The inquiry should be whether the agreement, which, in its necessary or contemplated operation upon the actions of the party to it, *tends* to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or of third parties, is against the principles of sound public policy, and consequently void."

Said court cited the case of *Western Wooden-ware Ass'n* v. *Starkey,* 84 Mich. 76, and also *Gibbs* v. *Consolidated Gas Company,* 130 U. S. 396.

Besides, the Court of Appeals of the Eighth Circuit, in a case arising in Kansas, pointed out clearly the difference between such contracts as that in the Griffin case and contracts which are void as against the public policy of Kansas. We refer to the case of *Hutchinson Gas & Fuel Company* v. *Wichita Natural Gas Company,* (8th Cir.) 267 Fed. 35. The contract involved in that suit as it was originally written was void because against the public policy of Kansas. As originally written that contract, because of its exclusiveness, tended to establish a monopoly. However, before the contract came into the courts, the parties to the contract changed the same so as to remove the exclusive void feature thereof. The Hutchinson Company, under the original contract, was given the exclusive agency to dispose of the gas furnished by the Wichita Company. In the contract as changed,

the right was given so that other companies might be created agents to sell the gas, thereby removing the objectionable feature. Evidently that was done in order to make the contract valid. That suit was brought by the Hutchinson Company, a distributing company, to enjoin the Wichita Company, a natural gas producing company, from raising its rate for the sale of its gas and from ceasing to supply the gas at a rate specified in the contract. The lower court refused to enforce the contract by injunction and the bill of complaint was dismissed. The decree of the lower court was affirmed.

The decision in the Fifth Circuit does not conflict with the decision of the Court of Appeals of the Eighth Circuit.

The same reasoning, which is above applied to the Griffin case, is applicable to the case of *Montgomery Traction Company* v. *Montgomery Light & Water Power Company,* 229 Fed. 672. That case first appears under the style of *Montgomery Light & Power Company* v. *Montgomery Traction Company,* 191 Fed. 657. The opinion in the case was given in the overruling of a demurrer to the bill of complaint. The Power Company, engaged in the business of generating and supplying electrical current for light and power, made a contract with the Traction Company, a company engaged in the street car business, whereby the Power Company agreed to sell and deliver, and the Traction Company agreed to purchase and receive electrical current for a period of fifteen years. At the time that the suit was brought, eight years

of the limited time in the contract had expired. The electricity was to be used by the Traction Company for propelling its cars and the cars of other corporations that might operate over the tracks of the Traction Company. Immediately upon the making of the contract, the Power Company expended $200,000.00 in machinery and apparatus to enable it to carry out the terms of the contract. The chief question considered and decided by the court in that case was whether the contract was capable of specific performance and injunctive relief.

The said case next appeared under the title of *Montgomery Light & Water Power Company* v. *Montgomery Traction Company,* 219 Fed. 963. That too was a decision in the district court and the opinion was upon the final hearing by a different judge from the former decision. In that opinion the court did discuss the question of whether or not the contract was against public policy and held that it was not. The court evidently had in mind (although it is not so stated) the public policy of the State of Alabama as the case arose and was tried in that state. In commenting upon the influence of public policy upon the validity of a contract, the court (page 969) expressly stated in substance that no court would lend its aid to the enforcement of an executory contract which was against public policy. Said court, citing *Thomas* v. *Railroad Company,* 101 U. S. 71, concluded that public policy forbade a corporation from making a contract which rendered it incapable of performing its duties to the public. It will therefore be observed that that

court held that that contract was not against public policy for the reason that it did not interfere with the discharge of a duty by the Traction Company to the public. On the other hand, the contract aided the Traction Company to discharge its duty to the public, and was therefore not against the interest of the public. In discussing the subject, the said court used this language:

> "On the contrary it is evident that such contract merely provided a means by which respondent was to perform the duty imposed upon it by its charter and the discharge of which it owed the public."

The ground of that decision was, therefore, that said contract was a benefit to the public and not an injury.

The said Montgomery case next appeared in the Court of Appeals of the Fifth Circuit under the title of *Montgomery Traction Company* v. *Montgomery Light & Water Power Company*, 229 Fed. 672. We do not find in the opinion any discussion of the alleged invalidity of that contract because in conflict with the public policy of Alabama. That court discussed (1) the power of a foreign corporation to make a contract under Alabama law; (2) whether that contract contained the mutuality entitling the Power Company to specific performance; and (3) that the contract could and should be specifically performed. It is therefore confidently submitted that said Montgomery case did not present the question of the invalidity of a contract whose tendency is to stifle competition and that subject was not discussed in any

one of those opinions. Judge Clayton was the only one of the judges who referred to the subject of public policy and his discussion related to that public policy which prohibits a corporation from entering into a contract which will disable it from discharging a public duty. The question here presented was not, therefore, presented there, nor discussed, nor decided.

If said Montgomery case has the meaning given it by learned counsel for the petitioners, then said decision is erroneous and in conflict with the decisions of the Supreme Court of Alabama on the subject under consideration. The Supreme Court of Alabama has repeatedly held that contracts against public policy are void and unenforceable. The following Alabama cases support the well established rule that contracts such as the one in controversy tend to establish a monopoly, and hence against public interest and public policy and are void:

American Laundry Co. v. *E. & W. Dry Cleaning Co.*, (Ala.) 74 So. 58.

Arnold v. *Jones Cotton Co.*, 152 Ala. 501.

Tuscaloosa Ice Mfg. Co. v. *Williams*, 127 Ala. 110.

Georgia Fruit Exchange v. *Turnipseed*, 9 Ala. App. 123.

We therefore respectfully submit that there is no conflict between this case and the cases of the Fifth and Tenth Circuits, and that if said cases are in conflict, then said cases are unsound because in that event they are contrary to the decisions of the Supreme Courts of Alabama and Kansas.

The decisions in the other circuit courts of appeal are in line with the decision of the Eighth Circuit on the question involved.

Without comment, we refer to the following cases:

Oceanic Steam Nav. Co. v. *Corcoran* (2d Cir.), 9 Fed. (2d) 724.

Hubbard Ayer Inc. v. *Federal Transportation Co.* (2d Cir.), 15 Fed. (2d) 274.

Continental Candy Corp. v. *California & Hawaiian Sugar Refining Co.* (D. C. Calif.), 270 Fed. 302.

Davis v. *Jointless Fire Brick Co.* (9th Cir.), 300 Fed. 1.

Sampliner v. *Motion Picture Patent Co.* (2d Cir.), 255 Fed. 242.

B. V. D. Co. v. *Isaac* (6th Cir.), 257 Fed. 709.

Davis v. *Southern Pacific Co.* (D. C. Calif.), 235 Fed. 731.

Waltham Watch Co. v. *Keene*, 209 Fed. 1007.

Western Union Telegraph Co. v. *Postal Telegraph Co.* (9th Cir.), 217 Fed. 533.

Fox Solid Pressed Steel Co. v. *Schoen Mfg. Co.* (3d Cir.), 84 Fed. 544.

Kellog Toasted Corn Flake Co. v. *Buck* (D. C. Calif.), 208 Fed. 383.

Whitridge v. *Mt. Vernon Woodberry Cotton Duck Co.* (D. C.), 210 Fed. 302.

Logan & Bryan Co. v. *Postal Telegraph Co.* (D. C.), 157 Fed. 570.

Bailey & Graham v. *Phillips* (5th Cir.), 159 Fed. 535.

C. M. & St. Paul Ry. Co. v. *Wabash* (8th Cir.), 61 Fed. 993.

We will also cite under Point Three from the state courts of California, Pennsylvania and New York, showing that the rule in those jurisdictions is the same as that decided by the court below.

In the case of *Tuscaloosa Ice Manufacurting Company* v. *Williams*, 127 Ala. 110, the court used this applicable language in speaking of the contract:

> "It tends to injure the public by stifling competition and creating a monopoly. Its manifest purpose, even upon its face, and certainly when taken in connection with the facts averred in the plea, was to secure to the covenantee a monopoly in the production and sale of ice in the town of Tuscaloosa and vicinity, and such is its operation and effect."

See 13 Corpus Juris, pages 478 and 481, and the innumerable cases there cited along the same line.

The Griffin, the Montgomery, and the Fort Smith Light & Traction Company cases (94 Ark. 461), which latter case will be discussed under Point Three, belong to a different class of cases from the instant case. The contracts in those cases are illustrated by the decision of the Supreme Court of Texas in the case of *Lone Star Gas Company* v. *Municipal Gas Company*, 3 S. W. (2d) 790, a case cited in the petitioners' brief at page 11. The theory upon which the contracts in that class of cases are sustained is that *they are in the interest and in the aid of the public.* They do not conflict with the public interest. They do not establish a monopoly. They aid a public service corporation, when such corporation is involved, in the discharge of its duty. In the Griffin case, a case referred to in petitioners' brief as involving a public service corporation, the furnisher of gas was not a public service corporation.

Consideration of the Contract.

Under Point One, and on page 6 of their brief, petitioners discuss the consideration. As we understand

their argument, it is that a valuable consideration supports the contract. In such case the consideration is immaterial. The rule is universal that a good consideration will not support a contract void as against public policy.

6 R. C. L., Section 14, page 707, and cases.
6 R. C. L., Section 204, page 803, and cases.
6 R. C. L., Section 214, page 814, and cases.
13 Corpus Juris, pp. 478 to 481, and cases.

Besides, the undisputed evidence shows that the petitioners made a net profit resulting from the contract, after paying itself for the expense of putting in the service pipe, the sum of $41,419.99. In addition, it is argued, as we understand the brief, that the service pipe was solely for the benefit of the respondent. The petitioners' evidence, as we construe it, is to the contrary. The General Manager of the petitioners did say (R. 156) that the said service pipe was of no use to the petitioners, except to serve the respondent. Said witness, however, immediately thereafter (R. 177, 179, 180) testified to facts which showed positively that said service connecting pipe was of service to the gas system. Said witness testified that, by reason of improvements in the highway, and by reason of washouts on the river front, and by reason of tramps setting fire to the gas near the river, customers on the two lines were occasionally out of gas. At one time the ten inch line was out of use for three weeks. By looking at the petitioners' map on page 146, it will be seen that the eight inch connection, which passed by the respondent's plant, when the ten inch line had

broken down at the river, would enable petitioners' customers to be served through the other line. When the eight inch line would break down the customers on that line could be served through this other (R. 156, 178, 180). It was claimed by said witness that the river caused one of the damages, public improvements caused the others, and tramps caused the third. The river will always be there as a menace, public improvements will always be made, and tramps will ever be present. Hence this service pipe is of use to the gas system and the General Manager of the petitioners so admitted on page 179. By its use the petitioners could supplement the gas pressure either way (R. 156, 179, 180).

Again it is argued (Petitioners' Brief page 7) that it was necessary for the respondent to have assured a gas supply during the life of the field. Counsel claim that the evidence of respondent's president "makes plain that a contract for a shorter period of time * * * would have been of no value to it." Clearly said counsel misunderstand the meaning of the evidence of C. H. Harding (See R. 216, 217, 218).

We therefore respectfully submit that, upon the contract itself and all the facts, said contract plainly tended to a monopoly. Said contract therefore tended to establish a monopoly and prevent other gas producers from entering that field. In addition to the other cases elsewhere cited, the following authorities support the contention that the instant contract tends to create a monopoly.

Shapard v. Lesser, 127 Ark. 59.
Pond on Public Utilities, Sections 205, 207.

6 R. C. L., Section 204, page 803, and cases.
Central New York T. & T. Co. v. *Averill*, 199 N. Y. 128.
Chicago Gas Light Company v. *People's Gas Light Co.*, 121 Ill. 530.

See also the Arkansas cases cited below under Point Three.

In the case of *United States* v. *Addyston Pipe & Steel Company*, 85 Fed. 271 (afterwards considered by this court in 175 U. S. 211), Judge Taft, then circuit judge, said:

> "But the sole object is to restrain trade in order to avoid the competition, *which has always been* the policy of the common law to foster" (italics ours).

Partial Restraint of Trade Will Not Be Tolerated in a Contract Between a Public Service Corporation and Its Customers.

This is a subsidiary question to the one above discussed, but in our opinion, necessarily has its place in determining whether petitioners are entitled to the writ of certiorari in the instant case. A full discussion is essential because petitioners (Brief pp. 6 to 9) give it great importance. In our opinion, the learned district court in this cause reached an erroneous result in part because of his misunderstanding the application of this doctrine to the instant case. The said court used this language:

> "I do not think that the contract was in restraint of trade. If, however, it could be said to have had such an effect, it was only a partial restraint of trade."

From that language we are impressed with the view that said learned court was of the opinion that partial restraint of trade did not invalidate a contract when said contract was between a public service company and a customer. The common law of England was adopted by the State of Arkansas and is in force in that state.

Crawford & Moses' Digest, Section 1432.
Horsley v. *Hilburn,* 44 Ark. 458.
Hardage v. *Stroope,* 58 Ark. 303.

See the Arkansas Constitution, decisions and statutes cited under Point Three below.

In *Gibbs* v. *Consolidated Gas Company,* 130 U. S. 396, this court said:

> "* * * innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or *quasi* public character, which are manifestly prejudicial to the public interest, cannot be upheld."

It was the rule at common law, and the rule in Arkansas under the common law, and we believe the rule everywhere, that a contract between a public utility and a customer, though only in partial restraint of trade, is yet absolutely void, because the public interest will not tolerate any kind of restraint in that respect by a public utility.

In 6 R. C. L., Section 204, page 803, the rule is thus declared:

> "The ordinary rule that contracts in partial or reasonable restraint of trade are not invalid, does not apply to corporations engaged in a public busi-

> ness. In fact it may be said that if there is any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it is shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest."

Many cases are cited in support of that doctrine, some of which are cited by the Court of Appeals of the Eighth Circuit in its opinion in this case (R. 256, 257, 258).

We think that rule is established by this court in the case of *Gibbs* v. *Consolidated Gas Company,* 130 U. S. 396. In that case, this court in substance stated that if the contract was forbidden by public policy, it was void. In the body of the opinion, this court, through Mr. Chief Justice Fuller, used this language:

> "Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract (*Printing Co.* v. *Sampson,* L. R. 19 Eq. 462), yet, in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy."

In support of that, this court cited in said opinion many authorities and we deem it unnecessary to review them here.

As to the public nature of the gas business, this court, in the Gibbs case, said:

> "The supplying of illuminating gas is a business of a public nature to meet a public necessity; and where such business cannot be restrained without prejudice to the public interest, contracts imposing such restraints, however partial, will not be enforced or sustained, because in contravention of public policy."

In Wyman on Public Service Corporations, Section 685, this language appears:

> "It is therefore idle for a *public service company* to attempt to ward off competition by entering into exclusive contracts for terms of years."

The same author, at Section 691, points out the very difference which the learned district court failed to recognize. It is there said:

> "It is a safe principle to go by that no arrangement will be enforced by the courts whereby public service is hampered, even if such arrangements are generally supported where private business is involved."

See: *W. Va. Transport Co.* v. *Ohio River Pipe Line Co.*, 22 W. Va. 600.

We cite the following cases on the same point without comment:

Gwynn v. *Telephone Co.*, 69 So. C. 434; 48 S. E. 460.

Salt Co v. *Guthrie*, 35 Ohio St. 672.

Pond on Public Utilities, Sections 205, 207 and cases cited.

Central New York T. & T. Co. v. *Averill*, 199 N. Y. 128.

Amarillo Oil Co. v. *Ranch Creek Gas Co.*, (Texas), 271 S. W. 145.

Love v. *Kozy Theatre Co.*, 193 Ky. 336.

It is the tendency of the contract which makes it void as against public policy.

Reeves v. *Decorah Farmers' Cooperative Society*, 160 Iowa 194.
W. W. Montague & Co. v. *Lowry*, 193 U. S. 38.
Anderson v. *Jett*, 89 Ky. 375.
Chapin v. *Brown Bros.*, 83 Iowa 156.
Boutwell v. *Marr*, 71 Vt. 1.
13 Corpus Juris, page 480, Section 423.
Barrows v. *McMurtry Mfg. Co.*, 54 Colo. 432.
Anderson v. *Shawnee Compress Co.*, 17 Okla. 231.
19 R. C. L. 36.

In Joyce on Monopolies, Section 92, page 119, the author says:

> "The rule that agreements in general restraint of trade are void while those in partial restraint when reasonable and founded upon a valid consideration are valid is declared to be not applicable to corporations engaged in a public business."

See also page 120, same book.
Union Trust Co. v. *Kinloch T. Co.*, 258 Ill. 202.

In *Sampliner* v. *Motion Picture Patent Co.*, 255 Fed. 242, the court said:

> "The question of whether a contract is void as contrary to public policy is determined by its general tendency, and if that is opposed to the interests of the public, the contract is void, even though in the particular case the intent of the parties may have been good, and no injury to the public may have resulted."

As long as the petitioners can maintain the complete monopoly which they now have, there will be no incentive to develop gas fields and increase the business

of the community and recover the natural gas, which is a great asset to that community.

This court, in the case of *Weil* v. *Neary*, 278 U. S. 160, said:

> "An agreement against public policy is void even though the intent was good and no injury resulted."

POINT TWO.

The decision of the Court of Appeals is not untenable; neither is it in conflict with the weight of authority.

The authorities from which we have quoted, and which we have discussed and cited above, are applicable here and, in our opinion, answer every contention of the petitioners made under Point Two. "Requirements" contracts cannot disregard public policy. There is nothing in the law that gives such contracts any validity or sacredness over other contracts. A contract which violates public policy cannot be validated by calling it a "requirements" contract. Such a ruling would make monopoly supreme. Competition would be smothered and destroyed under the cloak of requirements. Such a rule would validate every such contract although it created a monopoly. Such ruling would therefore repeal Section 19 of Article 2 of the Constitution of Arkansas. Such an argument overlooks the real ground upon which contracts like those in the Griffin, Montgomery, and Fort Smith Light & Traction Company (94 Ark. 461) cases are upheld. Such contracts as appear in those cases are contracts in aid of and for the benefit of the public interest.

The solid ground on which such contracts may logically rest is pointed out by this court in *Chicago, etc., Railroad Co.* v. *Pullman Southern Car Co.*, 139 U. S. 79. That contract obligated the Pullman Company to furnish to the Railroad Company all the requirements of the latter company as to pullman service. That contract was therefore as much a "requirements" contract as any of those cited by the petitioners. In that case, this court in substance held that the contract there involved, although exclusive for fifteen years, aided the Railroad Company to serve the public, and hence was not invalid, saying:

> "It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public."

In that case this court also pointed out the difference between contracts of that kind and contracts that are injurious to the public and void because in conflict with the public interest.

The Court of Appeals of the Eighth Circuit did not hold this contract invalid because it was a "requirements" contract. It was held invalid because it tended to establish a monopoly and was, therefore, against the public policy of the State of Arkansas. A "requirements" contract may be valid or invalid. We do not contend that the contract in controversy is invalid because it is a requirements contract. There may be, and is, a grave question as to whether paragraph (4) of said contract (R. 139) contemplates the furnishing of only such gas as the Twin City may will or wish to furnish. If that is its meaning, said con-

tract would fall by reason of the absence of a binding obligation against the Twin City to furnish gas. An agreement to furnish such gas as the Twin City may will or wish to furnish would impose a similar obligation upon the respondent to use such gas as the respondent might will or wish. Such a contract would therefore be unenforceable, for the reason that the quantity of gas is what either party might will or wish to buy or sell.

Hutchinson Gas & Fuel Co. v. *Wichita Natural Gas Co.*, (8th Cir.), 267 Fed. 35.
Cold Blast Transportation Co. v. *Kansas City Bolt & Nut Co.*, (8th Cir.), 114 Fed. 77.
Wells v. *Alexandre*, 130 N. Y. 642.
Woerheide v. *Barber Asphalt Paving Co.*, 251 Fed. 196.
Northern Iowa Gas & Electric Co. v. *Town of Luverne*, 257 Fed. 818.
Continental Petroleum Co. v. *Ocean Oil Co.*, 262 Fed. 278.

We do not, however, rely upon that proposition.

On pages 10 and 11 of petitioners' brief is cited a "wilderness" of cases, claiming said cases support the validity of "requirements" contracts. We have carefully examined every single case there cited. Not a single case there cited discusses the principle upheld by the Court of Appeals on which this case turns. It would make this brief too long to review those cases in detail.

However, in one of those cases (*Lone Star Gas Co.* v. *Municipal Gas Co* (Tex. Sup. Ct.), 3 S. W. (2d) 790) the principles are pointed out which distinguish those "requirements" contracts from the contract un-

der consideration. In that case the Texas Supreme Court did hold invalid a forfeiture clause in a contract between a gas producing company and a gas distributing company, for the reason that said forfeiture clause was in violation of public policy and tended to disable a corporation from discharging its public duty. Said court in effect held that the producing company, through the distributing company, was serving the consumers in the localities and towns. On that subject the Texas court said:

> "The Lone Star Gas Company undertook to serve the consumers of these various localities through the instrumentalities of the Municipal Gas Company. The Municipal Gas Company undertook to serve the consumers of these various localities through the instrumentalities of the Lone Star Gas Company. Neither can make use of a forfeiture or penalty clause of their contracts to defeat or avoid their duties to perform these public services."

On the same subject, the court further said:

> "Plaintiff in error's relation to these contracts, and through them to the consumers, together with its pipe line systems and defendant in error's distributing systems, fixes its public duties and obligations in the premises, and makes active and applicable the principle of public policy that, as a penalty, this right of forfeiture clause in the contracts cannot be invoked, but is unenforceable and void."

The Texas Court then quoted from the opinion of Chief Justice Fuller in the case of *Gibbs* v. *Consolidated Gas Company,* 130 U. S. 396.

The forfeiture clause in that case was therefore held invalid, *not because it was a requirements con-*

tract, but *because it violated public policy.* The court held that the remainder of the contract was in aid of the public interest and valid.

In further argument on Point Two as to "requirements" contracts, it is urged (Petitioners' Brief p. 12) that a contract of this kind is valid because it is necessary that the seller of natural gas, as a matter of sound business, should increase its investment in order to meet the requirements of an abnormally large industrial user. The plain meaning of that argument is that the seller of natural gas should have a right to make restrictive contracts and *establish a monopoly* in order to protect his investment. Such an argument means that the producer and seller of natural gas needs and must have a monopoly in order to earn a fair return. It means that Section 19 of Article 2 of the Constitution of Arkansas is invalid because it declares that a monopoly shall not be allowed.

See the case of *Cap F. Bourland Ice Co.* v. *Franklin Utilities Co.*, 180 Ark. 770 discussed below.

That argument is further emphasized by said counsel by urging that such a contract prevents the customer from being left free to abandon at any time the use of such gas. *Such an argument is plainly an admission that the contract creates a monopoly.* Similar reasoning is presented several times throughout petitioners' brief. Along the same line it is argued that the right of a customer to select at will his own gas producer and furnisher leads to business disaster. In other words, it is thus argued that the public policy condemning moropoly is wrong. We have found no decisions anywhere to support such reasoning.

Along the same line (brief p. 13) it is urged that a requirements contract between a public utility and a large industrial user "is far less susceptible to attack for illegality based upon monopolistic tendencies than similar contracts of purely private corporations where, as in the case at bar, the rates and service of the public utility are regulated by public authority." That argument confuses the principles applying to contracts covering the sale of a business or a profession with the class of contracts under consideration. Under the Constitution and laws of Arkansas, as we will show under Point Three, a contract "of purely private corporations," if contrary to the public policy of the realm, is invalid.

Along the same line it is urged that such a contract, although tending to establish a monopoly, will not be successful as such for the reason that public authority controls the price. *The control of the price is only one of the evils of a monopoly.* It is an interesting thing in the history of this gas development that, when competition was sharp and active, the price of gas was four cents. As the field became monopolized, it gradually increased until it is now at the rate of fifteen cents for industrial gas and about thirty cents for domestic gas. Besides, the Act of Arkansas referred to (Acts of Arkansas 1921, p. 199) shows that the public authority is only one of the powers that may fix a gas rate. The gas producing and gas distributing company is another important factor in the fixing of gas rates. The gas company has the power to cut down the supply. It may fail to make develop-

ment. It may take many other steps tending to make gas scarce, so that the community will be willing to have the public authority increase the price.

After making the above argument, counsel (brief p. 13) criticize the case of *Coombs* v. *Burk*, 40 Cal. App. 8; s. c. 180 Pac. 59. We respectfully submit that the argument against the sound principles of that case are likewise unsound. Said case was cited with approval by the California court in the case of *Fidelity Credit Assur. Co.* v. *Cosby*, 90 Cal. App. 25; s. c. 265 Pac. 372. Said case of *Coombs* v. *Burk* has also been cited in such textbooks as Elliott on Contracts and Williston on Contracts.

Elliott on Contracts and new Supplement, Section 817.

In note 24, the author says:

"A contract by which a gas company agrees to install for a consumer certain appliances in consideration of the latter's agreement to purchase all gas used from the company or pay a certain sum is void," citing the case of *Coombs* v. *Burk*.

The author in Section 817 cites the following cases:

Arnold v. *Jones Cotton Co.*, (Ala.) 12 L. R. A. (N. S.) 150, and note.
Chicago, I. & L. Ry. Co. v. *Southern Ind. Ry. Co.*, (Ind.) 70 N. E. 843.

In Williston on Contracts, Section 1645, the author states:

"A contract to sell within a certain territory goods of a specified kind to or through the agency of one person only generally is valid; but it is otherwise if such a contract is part of a

scheme whereby it is sought to establish a monopoly; or if freedom of dealing with a public service company is impaired, it will not be enforced," citing *Coombs* v. *Burk*.

The cases heretofore cited, as well as Section 1645 of Williston on Contracts, show the difference between the two classes of contracts. As the court below well reasoned, such contracts tending to establish a monopoly are void because against public policy and in restraint of trade.

In support of the principles declared by the California court in said case of *Coombs* v. *Burk*, it is believed that a number of cases from the Supreme Court of California sustain the rule announced by the Court of Appeals in the instant case. Without comment we refer the court to the following:

Santa Clara Valley Mill & Lumber Co. v. *Hayes*, 76 Calif. 387.

Shasta County v. *Moody*, (Calif.), 265 Pac. 1032.

We have already cited cases from the Ninth Circuit along the same line.

Petitioners under Point Two argue that the instant contract is only in partial restraint of trade. In making that argument, petitioners overlook the law which declares that no restraint of any kind will be tolerated in the contract of a public utility. We have argued that question fully under Point One above. It is decided by this court in our favor in *Gibbs* v. *Consolidated Gas Company*. See the many other authorities and cases cited in this brief above pages .... to .....

POINT THREE.

The decision of the Court of Appeals is not in conflict with the applicable local decisions on an important question of local law. On the other hand, the Constitution and decisions of Arkansas are in line with the opinion of the Court of Appeals.

Under this head petitioners have discussed the public policy of the State of Arkansas. We will first refer to the Constitution, laws and decisions of that state, and then briefly notice the cases cited by petitioners.

Arkansas Constitution, Laws and Decisions Showing that the Contract in Controversy is Void as Against Public Policy.

Section 19, Article 2, of said Constitution reads:

> "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed."

By Section 2 of the same article, the right to acquire and possess property is recognized and guaranteed. By Section 3 of the same article, the declaration is made that no citizen shall be deprived of any right, privilege or immunity. By Section 18 of the same article, the General Assembly of Arkansas is prohibited from making any grant to any citizen or class of citizens of privileges or immunities which upon the same terms shall not belong equally to all citizens. By Section 29 of the same article, the declaration is made "that everything in this article is excepted out of the general powers of the government, and shall forever remain inviolate; and that all laws

contrary thereto, or to the other provisions herein contained, shall be void."

The above sections of the Constitution of Arkansas plainly condemn any contract tending to establish a monopoly. The legislature of Arkansas is without power to pass any law the effect of which would be to establish a monopoly in violation of the above sections of the Constitution of Arkansas. It was so held in the very recent case of *Cap F. Bourland Ice Co.* v. *Franklin Utilities Co.*, 180 Ark. 770, a case cited by petitioners on page 17 of their brief, for another purpose however. In that case similar arguments to those made by petitioners, were advanced to sustain the validity of Sections 15, 16 and 17 of Act 55 of the General Assembly of Arkansas of 1929. For said Act, see Acts 1929, page 110.

In the case at bar, as we understand the argument of counsel for petitioners, as the same appears on pages 12, 13, 16 and 18 of their brief, the contention is made that the public utility should have the right to make an exclusive contract to protect its investment and to prevent a large customer from abandoning the service at any time. That was the same class of arguments advanced in the above case to sustain Sections 15, 16 and 17, which sections authorized the Arkansas Railroad Commission upon a hearing to forbid the establishment of a new ice plant in any municipality or community. It was urged that such a rule would prevent useless investments in such businesses and would protect both the public and the company furnishing the ice, and such action would

prevent the duplication of unnecessary plants, facilities and service and afford the public prompt and continuous service at just and reasonable rates.

After referring to the sections of the Arkansas Constitution above named, the Arkansas court held that Sections 15, 16 and 17 of said Act, *which in effect established a monopoly* of the ice business, were unconstitutional and void. That case was not published at the time of the decision of the Court of Appeals in the present case.

To show the general policy of the State of Arkansas, in addition to the Constitution, reference is made to Crawford & Moses' Digest, Sections 7368 to 7373. Those sections constitute what is known in Arkansas as the anti-trust law. We do not argue that those sections specifically cover the point in controversy. They do show, however, generally the public policy of said state.

In the case of *Shapard* v. *Lesser*, 127 Ark. 590 (1917), the court of Arkansas held void a contract the effect of which was to *stifle competition*, being, as we view it, the exact question involved here. The court used this language:

> "The avowed object of the contract, according to the allegations of the answer, was to stifle competition and to promote a monopoly in the cotton seed business to the manifest injury of the public."

In the case of *Jeffrey* v. *Ficklin*, 3 Ark. 227 (1841), the court held invalid a wager contract, apparently made upon the result of the national election of 1840.

The stake was a saddle. The loser was to give his note to the merchant in payment for the saddle. The case is not exactly in point, but it shows that any contract contrary to the *public policy* of the state is void. The court said:

> "Wagers, contrary to public policy, that are immoral, or affect the feelings, interests, or characters of third persons, are contrary to sound policy, and are not recoverable in law."

A similar question came before the Supreme Court of Arkansas in *Horn* v. *Foster*, 19 Ark. 346 (1858). In that case the said court held that there was no statute in Arkansas at that time prohibiting wagering on elections except as applied to judges and clerks. Notwithstanding that, the court held that such a wagering contract was against public policy and void.

In the case of *Hanauer* v. *Gray*, 25 Ark. 350, there were two considerations supporting the note sued on. They were Confederate bonds and Tennessee money. The court held the consideration of the Confederate bonds void as against public policy, but upheld the contract because Tennessee money was held to mean current coin of the United States.

In the case of *Woodruff* v. *Berry*, 40 Ark. 252 (1882), a case cited by this court in *Gibbs* v. *Consolidated Gas Company*, 130 Ark. 396, it was held that an agreement between bidders for the job of public printing, *which tended to stifle competition*, was illegal and void.

In *Lindsey* v. *Rottaken*, 32 Ark. 619 (1878), the question was whether it was against public policy or

a statute for the City of Little Rock to issue warrants. The court held the transaction against public policy and void, saying:

> "So a contract invading any one of the other interests which the law cherishes, though the thing to be done or promoted is not indictable, and not prohibited by any statute, termed a contract against public policy (or sound policy) is likewise void."

In the case of *Edwards* v. *Randle*, 63 Ark. 318 (1896), the court held that a contract for the sale of the fixtures of a post office, in which the vendor was the postmaster, in which contract the postmaster agreed to resign his office and recommend the appointment of the vendee as his successor, was "void as against public policy." The Arkansas court in that case quoted the definition of public policy from the author Greenhood.

In *St. L., I. M. & S. Ry. Co.* v. *Matthews*, 64 Ark. 398, the Arkansas court held that a contract between a locomotive engineer and a railroad company for perpetual employment of the engineer was against *public policy and void.*

In the case of *Kizer* v. *Texarkana & Fort Smith Ry. Co.*, 66 Ark. 348 (1899), the court held a contract between a railroad company and a patron to be void because in conflict with public policy. That case came before this court, but the writ of error was dismissed.

Kizer v. *Texarkana & Fort Smith Ry. Co.*, 179 U. S. 199.

In *Tallman* v. *Lewis*, 124 Ark. 6, a contract between a Board of Improvement and a member was

held void as against public policy. In that case the Arkansas court quoted from the opinion of this court in *Bank of United States* v. *Owens*, 2 Pet. 527.

In *Patterson* v. *Rogers*, 148 Ark. 222, the Arkansas court upheld a contract between private parties which was in partial restraint of trade, using this language in the syllabus:

> "Contracts in partial restraint of trade will be upheld *unless they result in the creation of a monopoly*" (italics ours).

That language and the rulings of the same court in the former cases indicate that *public policy condemns any contract which tends to create a monopoly.*

We will now notice the Arkansas cases cited by petitioners.

The first case is *Webster* v. *Williams*, 62 Ark. 101. The contract there involved was that of a physician selling his practice and agreeing to retire from the practice of medicine in a given town. The case involved the doctrine of partial restraint as applied to individuals. It did not involve the invalidity of partial restraint by a public utility.

The next case is *Keith* v. *Herschberg*, 48 Ark. 146. The same remarks apply to that case.

The next case is that of *Fort Smith Light & Traction Company* v. *Kelley*, 94 Ark. 461. In our opinion, *that case* when properly examined *is an authority against the contention of the petitioners.* Kelley and the Mansfield Gas Company were owners of gas wells and pipe lines. Kelley secured a franchise to furnish natural gas to the inhabitants of Fort Smith. Some

of the pipe lines were constructed by him and the Mansfield Gas Company. Then and prior thereto the Fort Smith Light & Traction Company had a franchise to manufacture and sell artificial gas in Fort Smith.

It was contended by Kelley in that case (p. 474) that if said contract excluded Kelley from furnishing gas in Fort Smith for forty-nine years, such provision was in restraint of trade and competition and against public policy and law and unenforceable. Kelley had assigned his rights under the ordinance to the Fort Smith Light & Traction Company. The contract included one of purchase, purchasing all the pipes and distribution system of Kelley and also obligated Kelley and his company to furnish gas for the life of the franchise. *That right*, however, to furnish gas *was not exclusive*. It was expressly provided in the contract that if gas should be offered to the Traction Company *by other parties* at a lower price, the Traction Company had the right to accept such other gas. It was also provided that if Kelley should meet the competition, thus presented, he would still preserve his right to furnish gas. Therefore, said contract, instead of being *in restraint of competition*, by express language *preserved competition*, giving the public the benefit of obtaining gas from other producers at a lower figure. Kelley took the view that (p. 474) when the Traction Company refused to take his gas but accepted lower gas from other parties, it broke the contract and authorized him to furnish gas to the public by reason of the ordinance and through the pipes which he formerly owned. The court held that that was an erroneous view of the contract.

Since said contract expressly preserved competition from any producer, the Arkansas court correctly held that it was not in restraint of trade. It preserved competition instead of destroying it. We think the said court expressly recognized the rule so clearly declared by the Court of Appeals in the instant case in the use of the following language:

> "One purpose of the law in prohibiting contracts in restraint of trade is to encourage competition and thereby lower the prices of services and commodities to the public."

In discussing said contract, the Arkansas court used this interesting language:

> "It was impossible for the consumer to be oppressed by a monopoly in the price of natural gas *under the terms of this contract, for by its terms appellant's pipes were open to every producer who applied for admission at a lower rate*" (italics ours).

In the instant contract, there is no such provision. On the other hand, no producer will be permitted to sell to the respondent any gas regardless of whose pipes convey the gas; and further there is absolutely nothing in the present contract which would permit the gas of other producers to come through the pipes of the petitioners. The contract there considered is clearly not one tending to destroy competition, but encourages competition and authorizes it to the extent that the gas may be brought to the consumers through the very same pipes. The said court (p. 475) therefore expressly stated that since said contract preserved competition and created no monopoly "inju-

rious to the rights of the public," the same was valid. Having thus held that said contract did not tend to create a monopoly, it was *obiter for the court to add the language quoted by petitioners on page 16 of their brief.* Since there was no restraint in that contract and no destruction of competition, it was immaterial to discuss a contract wherein there was a partial restraint of trade.

Petitioners on page 19 of their brief refer to the action of the respondent as being a "flagrant breach of contract." That suggestion has been repeatedly made throughout petitioners' conduct of this litigation. It is without merit. It is not wrong or immoral to refuse to perform a void contract.

Petitioners also refer to Section 7492 of Crawford & Moses' Digest. See brief page 22. The statute is not applicable. The petitioners did not have any exclusive franchise. It was so held in the case of *Citizens Pipe Line Company* v. *Twin City Pipe Line Company,* 178 Ark. 309.

The law on the subject seems to be the same as that declared by the Court of Appeals of the Eighth Circuit in the States of New York, Pennsylvania, Illinois and Georgia.

Judd v. *Harrington,* 139 N. Y. 105.
People v. *Sheldon,* 66 Hun. 590.
Nester v. *Continental Brewing Company,* 161 Pa. St. 473.
Morris' Run Coal Company v. *Barkley Coal Co.,* 68 Pa. St. 173.
Chicago Gas Light and Cook Company v. *The Peoples Gas Light and Cook Company,* 121 Ill. 530.

Western Union Telegraph Company v. *American Union Telegraph Company*, 65 Ga. 160.

Conclusion.

Petitioners in conclusion refer to two cases cited on page 19 of their brief. *It is respectfully submitted that the opinion of the Court of Appeals of the Eighth Circuit followed strictly the rule laid down by this court in those cases.*

We therefore respectfully submit that the petition for certiorari should be denied.

JOSEPH R. BROWN,
JAMES B. MCDONOUGH,
Counsel for Respondent.